84-1549

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

MAXWELL S. COBB,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

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Attorney for Petitioner

27pp

QUESTION PRESENTED

Where the Defendant received his Miranda warnings at his arrest approximately four months before trial, will Jenkins vs. Anderson allow the prosecution to cross-examine the Defendant regarding his pre-trial silence without distinquishing between pre-arrest and post-arrest silence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 28, 1984, rehearing denied on February 5, 1985.

CITATIONS TO OPINION BELOW

On December 28, 1984, the Eleventh Circuit Court of Appeals affirmed without opinion. Petition For Rehearing was denied on February 5, 1985. These orders of the court are found in Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1984, rehearing denied on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Defendant was arrested by agents of the Federal Bureau of Investigation on December 1, 1983, and charged with conspiracy to manufacture and distribute methamphetamine, distribution of methamphetamine, and three counts of use of a communication facility to facilitate that alleged conspiracy. At the time of his arrest, he was repeatedly given the "Miranda" warnings. Indeed, approximately one month preceding that arrest, he had been arrested by government agents in another case relating to alleged environmental violations. (He has since been acquitted of all charges in that other case, Case Number 83-170-Cr-J-16, Middle District of Florida). At the time of his earlier arrest, he was also advised of his "Miranda" rights. In exercise of these rights, he made no

statement to law enforcement authorities prior to trial.

At trial, he interposed the defense of entrapment.

The testimony showed that the Defendant was president and principal stockholder of the American Electric Company, whose primary business was in transformer maintenance including the transportation, removal, and disposal of P.C.B., a carcinogenic agent often found in transformer oil. The government's proof showed that a paid informant, Adrian Briscoe, who knew the Defendant from other business dealings, introduced F.B.I. Agent Donald Weathermon to the Defendant on March 11, 1983. The informant, Briscoe, had set up the meeting ostensibly to discuss a proposed transformer salvage operation on land allegedly owned by Agent Weathermon in the Atlanta area.

However, during this initial meeting on March 11, Briscoe advised the Defendant that Agent Weathermon was also interested in being involved in the manufacture or distribution of amphetamine. Briscoe advised Weathermon that the Defendant could be a source for that controlled substance. And, as part of the discussion, Briscoe asked the Defendant to produce a sample of the substance.

In response to this request, the Defendant made a telephone call to an individual now identified as Jerry Pendergrass. Approximately one hour later, Pendergrass met the Defendant, Weathermon, and Briscoe in the parking lot of a lounge. He delivered approximately one gram of a gray powder which later proved to be methamphetamine.

This initial meeting was followed by a series of telephone calls and meetings,

all but one of which were initiated by Agent Weathermon or Agent Driver of the Drug Enforcement Administration who later became involved. Despite repeated requests by the government agents, the Defendant never produced another sample or other quantity of the methamphetamine. There was, however, a continuing series of conversations regarding various plans for the production of the methamphetamine. In these conversations, the Defendant excused his failure to produce the drug because of his inability to secure P2P, a precursor ingredient necessary to the production of methamphetamine. Ultimately, the Drug Enforcement agent (Driver) offered to bring in his own chemist to meet with the Defendant's "chemist" in order to teach him how to produce the missing ingredient. Driver also provided the Defendant with a list of ingredients

needed to make the P2P. Thereafter, Agent Driver initiated one more meeting with the Defendant wherein the Defendant allegedly advised that his "chemist" would not agree to meet with Driver's chemist as Driver had suggested. That was the last communication or meeting involved in the alleged conspiracy.

During all of these conversations, there were contemporaneous conversations between the Defendant and the government agents regarding his ongoing desire to establish a transformer salvage business as discussed in the original meeting.

Cobb testified in his own defense that in early 1983 he was looking for a site to establish a transformer salvage operation. Also during that time, the financial condition of his business was extremely tenuous. According to the Defendant, this latter fact was well known to the Government informant.

The gist of his testimony was that he met with the government agents because of his interest in establishing a transformer salvage operation. When the government agents initiated discussion of drugs during this meeting, the Defendant went along with their request in order to maintain the rapport necessary to close the proposed transformer salvage deal. Through his acquaintance with the unindicted co-conspirator Pendergrass, he was able to secure the small sample originally delivered on March 11. After that first day's meeting, the Defendant described a series of calls where the government informant Briscoe continued to encourage him to go along with the discussions relating to drugs as part of the effort to close the salvage deal. According to the Defendant, he played along with these later discussions

without any real interest in actually participating in the illegal enterprise.

There was never any suggestion that he was coerced or threatened in anyway to insure his participation. Rather, his testimony established that to the extent that he was involved, participation was the product of governmental inducement or persuasion.

On cross-examination, the following occurred:

> "Q Now Mr. Cobb, the first time that you have in fact informed the F.B.I., because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass [unindicted co-conspirator] yourself, is in fact, today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?"

Following these questions and answer, the Defendant moved for mistrial. This motion was denied.

During closing arguments, the prosecutor argued in pertinent part:

> "And I ask you in that context, are you going to believe the way this was originally stated on the tape recordings, or are you going to believe a more favorable version made up by Cobb after he has heard all of the evidence and the way it's presented against him".

Following these remarks, the Defendant again moved for mistrial. That motion was denied.

The Defendant was thereafter convicted of all counts and sentenced to a cumulative total of five years imprisonment.

On December 28, 1984, the Eleventh Circuit Court of Appeals affirmed without opinion. Petition For Rehearing was denied on February 5, 1985.

REASONS FOR GRANTING THE PETITION

The Defendant had been advised of his "Miranda" warnings at the time of his arrest on these charges and approximately one month before that when arrested on other charges. In reliance upon those warnings, he made no statement prior to trial. On cross-examination, he was asked:

> "Q Now Mr. Cobb, the first time that you have in fact informed the F.B.I., because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass yourself, is in fact, today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?"

There was no attempt to delineate or in anyway circumscribe the timeframe

referred to by the prosecutor's questions. These questions were so broad as to contemplate not only the Defendant's post-arrest pre-trial silence, but his silence up to and including any moment before the third day of his own trial. There was no qualification or limitation in the framing of the question. Such cross-examination has been uniformly condemned as being far more prejudicial than probative, United States vs. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), and, as a deprivation of due process, Doyle vs. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

As a general proposition of law, it is clear that it is reversible error for there to be any cross-examination or comment regarding the defendant's silence following arrest and a "Miranda" warning such as occurred in the case at bar.

Indeed, it could well be argued that the continuing vitality of United States vs. Hale prohibits comment even in the absence of such "Miranda" warnings. But against this broad rule of prohibition, this Court has created what would appear to be a very narrow exception to the general rule regarding any comment on the defendant's pre-trial silence. In Jenkins vs. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) this Court approved such comment or questioning when related to the defendant's pre-arrest silence. This Court there found a substantial distinction between pre-arrest silence and the silence of a defendant who has been assured by governmental authorities that he has the right to remain silent, the right to counsel before speaking, and the implicit assurance that such silence (as opposed

to his statements) will not be used against him. In that case, the cross-examination very pointedly focused on the defendant's conduct immediately after his involvement in a homicide which he claimed at trial was committed in self-defense. In contrast to Doyle vs. Ohio, supra, the court there found no due process violation because of the use of such pre-arrest silence. Interestingly, the court specifically limited its ruling to the due process issue while leaving each jurisdiction free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. Undersigned counsel has found no case where this Court had decided whether the federal evidentiary rule announced in United States vs. Hale, supra, would extend to pre-arrest silence.

More appropriate to the facts in the case at bar is the concern that the exception created by the Jenkins vs. Anderson will devour the general rule prohibiting comment on pre-arrest silence. In the case at bar, the trial court responded to the Defendant's Motion For Mistrial by analogy to Eleventh Circuit authority, United States vs. Riola, 694 F.2d 670 (11th Cir. 1983), which approved the prosecutor's cross-examination of a defendant involving questions very similar to those in the case at bar. Riola, approved such cross-examination upon a finding that the defendant's coercion defense would necessarily leave the jury to conclude that the questions, considered in context, were directed to the defendant's failure to notify authorities before her arrest. There is logical appeal to this finding given the defendant's testimony

there that she was forced through threats of violence to participate in the distribution of cocaine. The trial court in the case at bar regrettably misread Riola to involve the defense of entrapment rather than coercion. From that erroneous premise, the trial court here found that it was a "fair question" of why didn't the Defendant "go to the authorities with this story?" The trial court therefore found that the jury would naturally take such questions as referring to the Defendant's pre-arrest silence. By its per curiam affirmance, the Eleventh Circuit has impliedly approved this analysis.

Only a clear and unequivocal statement by this Court will prevent such encroachment on the Defendant's right to maintain his pre-trial silence. It borders on sophistry to construe the questions at issue here (and the comment

in closing argument) as being other than a totally uncircumscribed inquiry as to why the Defendant remained silent up through and including the first three days of his trial.

By its previous decisions reviewed herein, this Court has made distinctions designed to serve the truth-finding process without doing violence to the defendant's legitimate due process guarantees. The case at bar offers the Court an opportunity to prevent further distortion of those distinctions that it so carefully drew.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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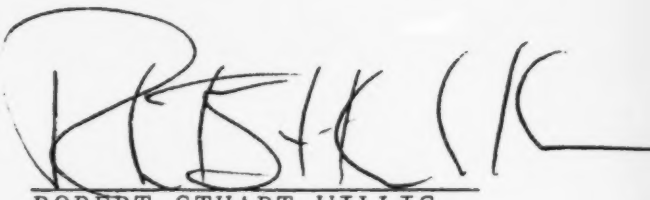
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solicitor General, and to Robert W. Merkle, United States Attorney, by U. S. Mail, this 29th day of March, 1985.



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A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3314
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXWELL S. COBB,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

(December 28, 1984)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3314

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXWELL S. COBB,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

(February 5, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge

(8)

No. 84-1549

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MAXWELL S. COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1549

MAXWELL S. COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor, during his cross-examination of petitioner and during his rebuttal closing argument, improperly commented upon petitioner's silence following his receipt of *Miranda* warnings[1] in violation of *United States* v. *Hale*, 422 U.S. 171 (1975), and *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to manufacture and distribute a controlled substance, methamphetamine, in violation of 21 U.S.C. 846, one count of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1), and three counts of using a telephone in furtherance of the conspiracy, in violation of 21 U.S.C. 843(b). Petitioner was

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[1]See *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

sentenced to a five-year term of imprisonment on the conspiracy count. On the four remaining counts, he was sentenced to concurrent three-year terms of imprisonment, to run concurrently with the five-year term that he received on the conspiracy count. He was also sentenced to a three-year special parole term to commence upon his release from confinement on the conspiracy count. The court of appeals affirmed (Pet. App. A1).

a. The evidence adduced at trial, the sufficiency of which is not in dispute, established that on March 11, 1983, petitioner was introduced to Don Weathermon, an undercover agent of the Federal Bureau of Investigation, in Jacksonville, Florida, by Adrian Briscoe, a confidential source for Agent Weathermon who had met Cobb several months beforehand (3 R. 67-68; 5 R. 272).[2] During the course of a lunchtime conversation, Briscoe asked Agent Weathermon whether he knew anyone who was interested in purchasing methamphetamine (3 R. 74). After Agent Weathermon replied that he might know someone in Atlanta who would be interested, petitioner offered to obtain some methamphetamine for Agent Weathermon (3 R. 75). Later that day, after telephoning and meeting with his contact, petitioner gave Agent Weathermon a sample of one gram of methamphetamine and offered to sell Agent Weathermon 14-15 pounds of methamphetamine in one-pound units (3 R. 51-52, 76-90). Agent Weathermon agreed to contact petitioner if he was interested in future sales (3 R. 90).[3]

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[2]The statement of facts is taken from the government's brief in the court of appeals.

[3]Agent Weathermon recorded all of his meetings and some of his telephone conversations with petitioner, and substantial portions of these tape recordings were played for the jury at petitioner's trial. See Gov't C.A. Br. 7 & n.4.

On March 17, Agent Weathermon telephoned petitioner to say that he was interested in purchasing methamphetamine, and he and petitioner agreed to pursue the matter further (3 R. 91-92). One week later, Agent Weathermon introduced petitioner to his contact in Atlanta, who was in reality Douglas Driver, an undercover agent for the Drug Enforcement Administration (3 R. 93-94). During their meeting, petitioner and Agent Driver discussed the sale of 5-10 pounds of methamphetamine at $8,000 per pound every two weeks (5 R. 329-330).

On April 6, petitioner asked Michael Hamm, a former employee of petitioner's, to locate a supply of P2P, a principal component of methamphetamine, and to sell some methamphetamine for him (5 R. 247-249). However, Hamm refused to become involved with petitioner, and, later that day, he informed the FBI of petitioner's request (5 R. 250-251). At a meeting on April 12, petitioner told Agent Weathermon that his "chemist" had been forced to dispose of 5-6 pounds of methamphetamine during the past week, because of heightened law enforcement activities in Jacksonville during that period, and that he was having difficulty obtaining P2P (3 R. 106; 4 R. 119; 5 R. 332-333). Petitioner reiterated his difficulties in obtaining P2P at several other meetings that he had with Agents Weathermon and Driver on May 20, June 10, and July 14 (4 R. 123-124; 5 R. 336-341). At the May 20 meeting, for instance, petitioner told Agent Weathermon that he had failed to locate any P2P and asked Weathermon to try to do so (4 R. 123-124). Three weeks later, still without a supply of P2P, petitioner informed Agent Driver that petitioner's chemist would himself attempt to synthesize the P2P (5 R. 336-337), and he later asked Agent Driver for detailed written instructions on its manufacture (5 R. 340). Petitioner and the undercover agents had no further contact after July 14 (5 R. 339, 341), and petitioner was arrested on December 1, 1983 (6 R. 481-482).

b. At trial, petitioner, who claimed to have been in poor financial condition at the time of the events in question, maintained that he had been entrapped, and he testified in his own defense (5 R. 399-426). He testified that, before the incidents alleged in the indictment took place, he had dismissed a former colleague named Jerry Pendergrass after discovering that Pendergrass was involved in the production of methamphetamine (5 R. 419-420). He later met Agent Weathermon through Adrian Briscoe, who told him that Agent Weathermon was looking to employ someone to salvage electrical transformers, but was also interested in purchasing some methamphetamine (5 R. 427-429). Briscoe, according to petitioner, encouraged petitioner to "go along" with Agent Weathermon if he asked petitioner to obtain some methamphetamine for him, so that they could secure the salvage job (5 R. 430). At the lunchtime meeting on March 11, according to petitioner, Agent Weathermon prodded petitioner to furnish him with a small sample of the drug, and petitioner did so simply to obtain Weathermon's business (5 R. 431-434). Petitioner also claimed that he never intended actually to supply the undercover agents with additional quantities of the drug, but felt that he had to "put on a front for these people" in order to secure the salvage job (5 R. 456; see also 5 R. 438-440).

At the outset of cross-examination, the prosecutor sought to impeach petitioner's defense by showing that he was not in dire financial straits at the time of the scheme (5 R. 457-464). After pursuing that line of inquiry, the prosecutor then asked petitioner whether his testimony on direct examination was the first time that he had brought his story about Pendergrass to the attention of the FBI or any other law enforcement authority (5 R. 464), to which petitioner

answered affirmatively (*ibid.*).[4] Petitioner's counsel objected and, out of the jury's presence, moved for a mistrial, contending that the question amounted to an improper comment on petitioner's post-arrest silence (5 R. 464-465). The district court, relying upon *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), and *United States* v. *Riola*, 694 F.2d 670 (11th Cir.), cert. denied, 460 U.S. 1073 (1983), denied the motion (5 R. 478). Viewing the government's questions in context, the court reasoned that because the "jury is aware in this case that there was one individual [*i.e.*, Hamm] who was approached concerning drugs who did go to the FBI," the jury "would logically take the Government's question to mean pre-arrest silence, especially because of the defendant's defense of entrapment, and Dennis Hamm's testimony" (5 R. 477; see 5 R. 474-477). However, the court suggested that the government's cross-examination "could be more artfully presented, so that there [would be] absolutely no question that the Government was talking about [the period] before [petitioner's] arrest" (5 R. 477). The court thus instructed the prosecutor to "rephrase the question and be very specific as to the time you're talking about" (5 R. 478). The court also ordered the government to take similar care during closing argument (*ibid.*).

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[4]The questions were as follows (5 R. 464):

> Q Now, Mr. Cobb, the first time that you have in fact informed the FBI, because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass yourself, is in fact today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?

Defense counsel objected before petitioner could answer the second question (5 R. 464).

In accordance with the district court's instructions, the prosecutor continued his cross-examination of petitioner by asking him whether he had "heard Mr. Hamm say yesterday that he went to the [FBI] the same night that he talked to you about this matter" (6 R. 481). Petitioner answered that he had and then admitted, following the prosecutor's next question, that he "had all the way up to December 1, the time of [his] arrest, to go to the [FBI] on the same matter, and yet [he] didn't" (6 R. 481-482). During rebuttal closing argument, the prosecutor observed that Hamm, upon being invited by petitioner to join the conspiracy to manufacture methamphetamine, instead went immediately "to the FBI. And isn't that what any citizen truly concerned about not being involved in something like this, would do?" (7 R. 584).

c. The court of appeals affirmed petitioner's convictions without opinion in a summary affirmance order. Pet. App. A1.

2. The summary affirmance order of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Petitioner maintains that the prosecutor, during his cross-examination of petitioner and again during his summation to the jury, improperly commented upon petitioner's silence following his receipt of *Miranda* warnings in violation of *United States* v. *Hale, supra*, and *Doyle* v. *Ohio, supra*.[5] That claim lacks merit.

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[5]At several points, petitioner phrases his argument in terms of the prosecutor's alleged references to his silence following his *arrest*. Pet. 13, 14. However, it is clear that an arrest, by itself, is insufficient to trigger the rule adopted in *Hale* and *Doyle*. See *Fletcher* v. *Weir*, 455 U.S. 603, 605-607 (1982). Rather, it is the administration of *Miranda* warnings that alone gives rise to a claim that a prosecutor has improperly referred to a defendant's out-of-court silence. See *ibid.*; see also

In *Hale* and *Doyle*, the Court held that the government may not use a suspect's silence following his receipt of *Miranda* warnings as proof of his guilt. 422 U.S. at 176-181; 426 U.S. at 617-620. A suspect's silence in those circumstances, the Court explained, is insolubly ambiguous, because it is as likely that he remained silent because he had been advised that he was entitled to do so as it is that he remained silent because his only response would have incriminated him. *Hale*, 422 U.S. at 176-177; *Doyle*, 426 U.S. at 617. Furthermore, because *Miranda* warnings implicitly assure a suspect that he will not be penalized for exercising his right to remain silent, it is fundamentally unfair, the Court reasoned, to allow the government to use a suspect's silence to incriminate him. *Doyle*, 426 U.S. at 618. At the same time, however, the Court has made it clear that the government may use a suspect's silence *prior* to his receipt of *Miranda* warnings as proof of his guilt. *Fletcher* v. *Weir*, 455 U.S. 603, 605-606 (1982); *Jenkins* v. *Anderson*, 447 U.S. at 235-241; see also *Anderson* v. *Charles*, 447 U.S. 404, 407-408 (1980). As the Court explained in those cases, because it is the administration of *Miranda* warnings that gives rise to both the ambiguous nature of a suspect's ensuing silence and the unfairness attendant upon using that silence to prove his guilt, the government is not barred from using a suspect's silence where he has not received *Miranda* warnings. *Fletcher*, 455 U.S. at 605-606; *Jenkins*, 447 U.S. at 235-241.

This case clearly falls on the *Fletcher-Jenkins* side of the line. In its case-in-chief, the government showed that petitioner was a willing participant in the conspiracy to manufacture and distribute methamphetamine and that petitioner's former employee, Hamm, unlike petitioner, immediately

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Anderson v. *Charles*, 447 U.S. 404, 407-408 (1980); *Jenkins* v. *Anderson*, 447 U.S. at 239-240.

told the FBI of petitioner's scheme after petitioner had asked him to become involved. In his defense, petitioner contended that he had been coerced into joining the scheme, and he testified that the only reason that he had done so was to convince Agent Weathermon to hire him for the salvage job that he needed. On cross-examination, the government, after attempting to show that petitioner was not in financial trouble during the conspiracy, sought to impeach petitioner's sincerity by pointing out his failure to bring the scheme to the FBI's attention prior to his testimony at trial. In this context, as the district court found (5 R. 477), the jury would naturally have concluded that the prosecutor's questions referred to petitioner's failure during the conspiracy to bring his predicament to the attention of the FBI. Moreover, the prosecutor made that point clear during his follow-up questioning and closing argument by expressly comparing petitioner's silence with Hamm's decision to contact the FBI, which had occurred months before petitioner was arrested and given *Miranda* warnings.[6] The

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[6]Petitioner's claim (Pet. 12-13) that the prosecution failed precisely to identify the time to which his questions referred ignores both the prosecutor's follow-up questions, which expressly referred to the period prior to petitioner's arrest, as well as the factual context in which the earlier questions were asked.

Petitioner also argues (Pet. 16-17) that the district court erroneously relied upon *United States* v. *Riola, supra*. However, *Riola*, as the district court recognized (6 R. 477), is virtually identical to this case. See 694 F.2d at 673. In any event, any conflict between this case and *Riola* is for the Eleventh Circuit, not this Court, to resolve.

district court thus correctly denied petitioner's motion for a mistrial.[7] Accordingly, because the court of appeals' summary affirmance of the district court's ruling is fully consistent with *Fletcher* and *Jenkins*, review by this Court of petitioner's fact-bound claim is unwarranted.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[7]Petitioner also erroneously argues (Pet. 11, 17-18) that he prosecutor improperly referred during his rebuttal closing argum nt to petitioner's silence. As noted above (page 6), the prosecutor simply compared petitioner's inaction prior to his arrest with Hamm's decision immediately to report petitioner's scheme to the FBI. Doing so was fully consistent with *Fletcher* and *Jenkins*. In addition, to the extent that petitioner objects (Pet. 11) to the prosecutor's comparison of his testimony at trial with his earlier willingness, evident on tape recordings played for the jury (see page 2 note 3, *supra*), to participate in the drug manufacturing scheme, the prosecutor's closing argument had nothing at all to do with petitioner's silence and was entirely appropriate. See, *e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (closing argument may address relevant issues raised during trial).

[8]Moreover, given the clear proof of petitioner's guilt, any error would have been harmless. See generally *United States* v. *Hasting*, 461 U.S. 499 (1983).